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June 23, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Reply to Opposition of ASF."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By:


Stephen T. Felverton

Enclosure

B:CATON.146

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

To: The Review Board

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)
) MM Docket No. 93-107

)
) File Nos. BPH-911230MA

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) through

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) BPH-911231MB
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

REPLY TO OPPOSITION OF ASF

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: _____

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June 23, 1994

B:CATON.146

REPLY TO OPPOSITION OF ASF

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (c)(3) of the Commission's Rules, hereby submits this reply to opposition. On June 6, 1994, ORA filed a motion to dismiss the application of ASF Broadcasting Corporation ("ASF"). Dismissal was requested because ASF does not have a proposed tower site and because it has failed to diligently prosecute its application by not obtaining a new site. On June 20, 1994, ASF filed an opposition thereto. In reply to the opposition, ORA submits the following comments.

As noted in the motion to dismiss, ASF filed an amendment on April 15, 1994, and reported that its proposed tower site had been sold by Mid-Ohio Communications, Inc. to Spirit Communications, Inc. Although ASF never disclosed when the site was sold, it was given written confirmation of the sale by Mid-Ohio on March 2, 1994.

ASF further represented that it would be receiving "reasonable assurance" of the availability of the tower site from the new owner. However, in a pleading, dated May 13, 1994, ASF reported that the new owner had changed his mind. ASF was aware of the unavailability of the tower site from the new owner at least by April 13, 1994. ASF represented in its May 13, 1994, pleading that it was in the process of securing permission for a new site and promised to file an amendment. ASF so far has failed to file an amendment specifying a new tower site. David A. Ringer, another applicant in this proceeding who also had initially specified the now unavailable Mid-Ohio tower site, filed amendment on May 9, 1994, specifying a new tower site.

ORA contended in its motion to dismiss that the application of ASF must be dismissed with prejudice for failure to prosecute. It does not have a tower site and has not been diligent in specifying a new site.

ASF claims that it will amend its application sometime in the future to specify a new tower site. According to ASF, Commission policy gives it wide latitude to locate a new tower site and to file an appropriate amendment.

However, ASF misunderstands Commission policy in this respect. Due diligence depends on the unique facts and circumstances of each case. Shablon

Broadcasting, Inc., 93 FCC2d 1027, 1030 (Rev. Bd. 1983). See also, CBM Broadcasting Limited Partnership v. FCC, Case No. 92-1263, p. 12, decided June 13, 1994, due diligence is an essential element of "good cause" to amend and such due diligence is measured from the date an applicant is put on notice or challenged as to an application deficiency. There, the Court held that an applicant was required to amend its application, at least, by the time it responded to a motion to enlarge the issues raising an application deficiency.

In this case, due diligence must be measured against Ringer's filing of a tower site amendment on May 9, 1994, and ORA's June 6, 1994, motion to dismiss challenging ASF's lack of due diligence in this respect. ASF and Ringer are identically situated. Therefore, ASF must explain and justify why it could not also have filed an amendment specifying a new tower site by May 9, 1994, or at the very least, by the time of it filing a response on June 20, 1994, to ORA's motion to dismiss.

ASF's promise, in its June 20, 1994, opposition, to file a tower site sometime in the future, must be evaluated in the context of its earlier promise to file a tower site amendment. In its May 13, 1994, pleading, ASF made such a vague promise, but never fulfilled it. Simply put, ASF can not be relied upon to make good on its promises.

In conclusion, Commission precedent requires the dismissal of ASF's application because of a failure to amend to specify a new tower site. Royce International Broadcasting Co. v. FCC, 820 F.2d 1332, 1332 (D.C. Cir. 1987).

WHEREFORE, in view of the foregoing, ASF must be dismissed with prejudice forthwith because it does not have a proposed tower site and because it has failed to diligently prosecute its application by not obtaining a new site.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

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June 23, 1994

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 23rd day of June, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Reply to Opposition of ASF" to the following:

Joseph A. Marino, Chairman*
Review Board
Federal Communications Commission
Room 211
2000 L Street, N.W.
Washington, D.C. 20554

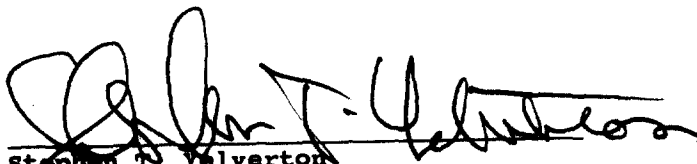
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